

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SAMANTHA M. MONTOYA

Claimant

VS.

HOSPICE OF RENO COUNTY

Self-Insured Respondent

Docket No. 1,067,521

ORDER

STATEMENT OF THE CASE

Self-insured respondent requested review of the February 3, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Melinda G. Young of Hutchinson, Kansas, appeared for claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for respondent.

The ALJ found claimant's injury arose out of and in the course of her employment on October 8, 2013. The ALJ ordered respondent to pay temporary total disability benefits beginning October 9, 2013, and continuing. The ALJ also ordered respondent to pay for claimant's prior related medical treatment and authorized Dr. Kenneth Jansson as claimant's treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 28, 2014, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues claimant failed to meet her burden of proving an injury arising out of and in the course of her employment. Moreover, respondent maintains claimant's injury occurred as a result of a normal day-to-day activity; therefore, the ALJ's Order should be reversed.

Claimant contends the ALJ's Order should be affirmed, as she suffered an injury arising out of and in the course of her employment with respondent.

The sole issue for the Board's review is: Did claimant's accidental injury arise out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant worked for respondent as a home health aide, a position in which she helped “with activities of daily living, personal hygiene, just little things that our clients need.”¹ Claimant traveled to clients’ homes and facilities to perform her duties. On October 8, 2013, claimant testified she felt a pop in her right knee while visiting a client:

I had arrived at my client’s home and I bent down to speak to her in the wheelchair and it felt like my knee popped, and there was a lot of pain and it took me a minute to stand up. And then when I did stand up, I suffered through my client’s personal hygiene and then I left and went back to the office and basically just kept my leg up for a while.²

Claimant explained she was in the process of squatting to speak to her client and had already put weight on her right knee when the pop occurred. She stated, “I came down on my right knee. It popped, and then I immediately had to put my left knee down.”³ Further, claimant explained she squatted to speak to her client as a show of respect. She testified bending down to speak to a wheelchair-bound client is not a requirement of her job.

Claimant had only one client on October 8, 2013. After the appointment, she returned to the office to complete paperwork. She did not report her injury to respondent at that time.

Later that evening, claimant exercised by walking on a track as part of a weight-loss regimen. Claimant testified she attempted to jog, but had difficulties which required her to instead walk. Claimant stated, “I thought maybe I could just, you know, walk this off.”⁴

Claimant returned to work the next day with a swollen right knee. Claimant stated she could barely walk at that time, and she reported the injury to respondent. Respondent sent claimant to Dr. Verlin Janzen of the Hutchinson Clinic in Hutchinson, Kansas, for treatment on October 9, 2013.

Dr. Janzen diagnosed claimant with right knee joint pain and recommended over-the-counter pain medication. Dr. Janzen restricted claimant to non weight-bearing on the

¹ P.H. Trans. at 6.

² *Id.* at 7.

³ *Id.* at 8.

⁴ *Id.* at 17.

right leg with crutches, with a gradual return to weight bearing before claimant's October 14, 2013, follow up appointment. Dr. Janzen released claimant to work with restrictions.

On October 14, 2013, claimant returned to the Hutchinson Clinic for a follow-up appointment with Dr. Jeffery Thode. Claimant complained of continued right knee pain and inability to bear weight on her right leg without crutch support. Claimant told Dr. Thode she had pain on extension of her right knee and was unable to bend her knee. X-rays revealed a right knee joint effusion but were otherwise negative. Dr. Thode performed a physical examination and determined claimant sustained internal derangement of the right knee. Dr. Thode recommended claimant continue over-the-counter pain medication and return to work with restrictions of no walking or climbing. Dr. Thode also recommended an MRI of the right knee and follow-up with Dr. Janzen.

Following her appointment with Dr. Thode, claimant was notified her medical treatment was no longer approved, as it was "normal wear and tear."⁵ Claimant visited her primary care physician, Dr. Rogena Johnson, to obtain a second opinion on October 16, 2013. Dr. Johnson made the following assessments:

Old bucket handle tear of medial meniscus of knee - suspect meniscal tear based on mechanism of injury and physical exam, xray [*sic*] would not show this type of injury, pt needs MRI of knee for further evaluation, limit walking and no lifting over 10 lbs, suggest knee brace, it is possible that she did indeed tear her meniscus while squatting or kneeling at work as described . . .⁶

Dr. Pedro Murati, a board certified independent medical examiner, examined claimant at her counsel's request for purposes of an independent medical evaluation (IME) on November 14, 2013. Claimant complained of frequent right knee pain increasing in the evenings, difficulty with daily activities due to right knee pain, pain in the right thigh area that occasionally goes into the right hip and back, and a limp due to right knee pain that worsens throughout the day.⁷ After reviewing claimant's medical history, medical records, and performing a physical examination, Dr. Murati diagnosed claimant with right patellofemoral syndrome with probable meniscal issue, low back sprain secondary to antalgic gait, right SI joint dysfunction due to antalgia, and right trochanteric bursitis due to antalgia. Dr. Murati further noted:

⁵ *Id.* at 11.

⁶ P.H. Trans., Cl. Ex. 3 at 5.

⁷ See P.H. Trans., Cl. Ex. 1 at 1.

This claimant's current diagnoses are within all reasonable medical probability a direct result from the work-related injury that occurred on 10-08-13 during her employment with [respondent].⁸

Dr. Murati imposed the following temporary restrictions: no bending, crouching, or stooping; no climbing stairs or ladders; no squatting; no crawling; no kneeling; no repetitive right foot controls; no lifting/carrying/pushing/pulling over 20 pounds; no lifting below knuckle height; and occasional standing and walking with alternating sitting, standing, and walking. Dr. Murati recommended treatment of cortisone injections, physical therapy, anti-inflammatory and pain medication, the use of a knee brace, and an MRI of the right knee. Dr. Murati opined:

The claimant sustained a work related injury which resulted in right knee, low back, and right hip pain. . . . She has no significant pre-existing injuries that would be related to her current diagnoses. She has significant clinical findings that have given her diagnoses consistent with her described accident at work. Apparently, on this claimant's date of injury she sustained enough permanent structural injury to her right knee which produced antalgia resulting in low back and right hip pain necessitating treatment. Therefore, it is under all reasonable medical certainty and probability the prevailing factor in the development of her conditions is the accident at work.⁹

Claimant testified respondent was unable to accommodate her restrictions, and she has not worked since October 9, 2013.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b states, in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

⁸ P.H. Trans., Cl. Ex. 1 at 2.

⁹ *Id.* at 4.

K.S.A. 2013 Supp. 44-508(d) states:

"Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2013 Supp. 44-508(f)(2) states:

An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

¹⁰ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹¹

ANALYSIS

Claimant's testimony that she crouched down and felt a pop in her right knee is a description of an undesigned, sudden, and unexpected traumatic event, but not necessarily accompanied by a manifestation of force. Claimant's testimony also identified by time and place of occurrence the beginning of her symptoms of an injury. Claimant testified her injury occurred while she was involved in work activities. Claimant's testimony is undisputed. The undersigned finds claimant suffered an injury by accident while performing work for respondent.

The issue of arising out of and in the course of employment is a more difficult issue. Respondent raises a legitimate question regarding claimant's actions on the evening of the alleged accident. It is inconsistent claimant would walk and jog for exercise if her knee was injured at work. While inconsistent, there is no medical support in the record the walking or jogging caused or aggravated the knee condition.

The only medical evidence in the record regarding the walking and jogging is by Dr. Murati. Dr. Murati recorded in the medical history portion of his report claimant told him about attempting to walk and jog after the bending incident. Dr. Murati opined the bending down was the prevailing factor in the development of her conditions, including her right knee. Dr. Murati's opinions are uncontradicted. Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless it is untrustworthy.¹²

Respondent next argues the act of bending down on the right knee is an activity of daily living. The Supreme Court in *Bryant v. Midwest Staff Solutions, Inc.*,¹³ wrote:

Although no bright-line test for what constitutes a work-injury is possible, the proper approach is to focus on whether the injury occurred as a consequence of the broad spectrum of life's ongoing daily activities, such as chewing or breathing or walking in ways that were not peculiar to the job, or as a consequence of an event or continuing events specific to the requirements of performing one's job. "The right to compensation benefits depends on one simple test: Was there a work-connected injury? ... [T]he test is not the relation of an individual's personal quality (fault) to an

¹¹ K.S.A. 2013 Supp. 44-555c(j).

¹² *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

¹³ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

event, but the relationship of an event to an employment.” 1 Larson’s Workers’ Compensation Law § 1.03[1] (2011).¹⁴

In *Bryant*, the claimant was simply stooping over to pick up a tool and felt a pop in his back. Even though the respondent argued the act of stooping over to pick something up was a daily activity, the Supreme Court found the claimant “was not engaged in the normal activities of day-to-day living when he reached for his tool belt.”¹⁵ In this case, claimant’s knee condition was caused by kneeling down to talk to her client, an activity associated with her employment with respondent.

The Supreme Court in *Bryant* noted, “To be sure, twisting or bending over are daily activities, for workers as well as nonworkers. So are lifting objects, cutting pieces of meat, typing on keyboards, and walking and standing for extended periods of time.”¹⁶ The test is the relationship of an event to the employment. Claimant was performing the duties of her employment when she kneeled down to talk to her client.

It is of note claimant did not testify regarding any physical problems related to her low back and hip. There is no note of low back or hip complaints in any of the medical treatment records placed into evidence. Notwithstanding the lack of complaints prior to her IME, Dr. Murati diagnosed low back strain, right SI joint disfunction, and right trochanteric bursitis. Dr. Murati made treatment recommendations for each of the listed conditions. Dr. Murati’s opinions regarding the low back and hip are unsupported by the treatment records and claimant’s testimony.

CONCLUSION

Claimant suffered an injury by accident to her right knee arising out of and in the course of her employment with respondent when she kneeled down to talk to her client.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated February 3, 2014, is modified to limit medical treatment to claimant’s right knee. Medical treatment for the low back and hip is denied. ALJ Klein’s Order is affirmed in all other respects.

IT IS SO ORDERED.

¹⁴ *Id.* at 595-596.

¹⁵ *Id.* at 596.

¹⁶ *Id.* at 595.

Dated this _____ day of May 2014.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Melinda G. Young, Attorney for Claimant
melinda@byinjurylaw.com

Edward D. Heath, Jr., Attorney for Self-insured Respondent
heathlaw@swbell.net

Thomas Klein, Administrative Law Judge